Supreme Court, U.S.
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No. 01-455

In the

Supreme Court of the United States

FRANCONIA ASSOCIATES, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

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GRASS VALLEY TERRACE, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's opposition contains numerous arguments and admissions that demonstrate the appropriateness of, and necessity for, Supreme Court review here. For example:

- The government claims that it is exempt from standard contract law principles, insofar as those principles touch upon the statute of limitations under 28 U.S.C. § 2501.
- The government asserts that legislation passed by Congress can immediately "eliminate" rights under government contracts, even without any action by the contracting agency.

The government also severely misstates and improperly attempts to limit this Court's recent decision in *Mobil* and its expansive precedent on the ripeness of regulatory taking claims, demonstrating the extent to which its positions will engender confusion in these areas of the law. For these reasons, the government's opposition aptly demonstrates the "cert. worthiness" of the issues raised in the Petition.

I. Under Standard Contract Law Principles, Petitioners' Contract Claims Were Filed In A Timely Manner.

A. Respondent Seeks A "Section 2501 Exemption" From Standard Contract Law Principles.

This Court has held time and again that when the government enters into contracts with private parties, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *See* Pet. 14-15. Respondent, however, goes so far as to assert that it is *not* bound by ordinary contract law principles when the statute of limitations that applies solely to claims against the government, 28 U.S.C. § 2501, comes into play. Opp. 10 ("there is no reason that results under Section 2501 necessarily must mirror results in cases applying statutes of limitations to private parties' and "there can be no direct comparison" between the two). Thus, respondent asserts

that even if petitioners' claims would be deemed timely under the doctrine of anticipatory repudiation in a private contract dispute, the courts should apply a different rule in contract actions against the government that would permit such claims to be dismissed as untimely.

The government provides no authority for its unprecedented position that Section 2501 provides it refuge from standard contract law. Such an exemption, permitting the government to obtain dismissal of claims that would be heard on their merits in a commercial contract dispute, would broadly expand "the Government's opportunities for contractual abrogation" and would have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *United States v. Winstar Corp.*, 518 U.S. 839, 844 (1996) ("*Winstar*"). Respondent's assertion that it can avoid the rules governing private contracts when Section 2501 is concerned, by itself, warrants Supreme Court review. This Court should grant certiorari here if only to hold the government accountable to standard contract law and protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Id.* at 883.

B. Legislation Cannot "Eliminate" Contract Rights.

The main issue presented in this case is whether legislation passed by Congress can "eliminate" and effect an immediate breach of contracts entered into by an executive agency without any corresponding action by that agency. Citing no relevant authority, the government asserts that it can. Opp. 9 (asserting that petitioners' claims accrued on the date that the legislation was passed because "the law eliminated" their contract rights). As explained in the petition, however, Congress cannot and does not, through legislation, breach contracts that agencies have entered into with private parties. Rather, some action by the agency is required for a breach to occur. *See* Pet. 15-21. As a result,

the statute at issue amounted to no more than an anticipatory repudiation of the government's obligations. *Id.*

The government's belief that legislation can immediately abrogate contract rights might be plausible if the legislation qualified as a "sovereign act." In that situation, the government might argue that because the law is "public and general" in its impact (*see Winstar*, 518 U.S. 839, 879 n.22 (1996)), rights under affected contracts could essentially disappear upon the enactment of the law. In this case, however, the government concedes that it cannot rely on the sovereign acts or unmistakabilty doctrines to justify its actions. Opp. 12-13 n.4. This is because the statute at issue "constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered" and therefore was not protected by the government's sovereign defenses. *Kimberly Assoc. v. United States*, 261 F.3d 864, *reh. denied* No. 99-35188 (9th Cir. 2001); *accord Adams v. United States*, 42 Fed. Cl. 463, 480 (1998). Accordingly, there is no basis for respondent's argument that the legislation had the power to immediately "eliminate" petitioners' contract rights.[1]

C. The Agency With Whom Petitioners Contracted, Not Congress, Breached The Contracts.

The fact that Congress cannot eliminate contract rights and that only contracting agencies can breach government contracts is made clear by this Court's application of the

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[1] "The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995). In this case, the contracts do not contain any such provision permitting for changes by way of legislation, and in fact stated that the terms of the contracts could only be "changed by agreement between [the parties] after this agreement becomes contractually binding." The contracts further state that any such agreement "must be in writing." Pet. App. A173, ¶12(c),(d).

Restatement (Second) of Contracts ("Restatement") § 250 in *Mobil Oil Exploration & Producing SE, Inc. v. United States*, 530 U.S. 604 (2000) ("*Mobil*"). *See* Pet. 17-19. There, the Court held that a statute announcing that the government would no longer honor the terms of lease contracts entered into with oil companies constituted a "repudiation" as defined by the Restatement § 250: "a statement by obligor to the obligee indicating that the obligor will commit a breach." *Id.* at 608, 619 ("if legislation passed by Congress and signed by the President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement").

Respondent attempts to avoid *Mobil* only by severely mischaracterizing it. First, respondent denies that the Court held that the legislation at issue constituted a repudiation of the contracts, stating that the decision could be construed as holding that the statute effected an immediate, rather than prospective, breach. Opp. 14-15. However, one need only read the opinion and the language of the Restatement § 250 to see that the case cannot possibly be understood as respondent suggests. The Court began by explaining the contract principles regarding repudiation and then held that the legislation at issue constituted just such a repudiation under the Restatement. *Id.* at 608, 619-21. Although the Court acknowledged that the government ultimately may have breached the contracts, it consistently described the *legislation* as a "repudiation," *i.e.*, a "statement" of the government's "intent" to breach the contracts. *Id.* at 619, 620, 621. The Court's introductory remarks leave no doubt as to its holding: "We agree that the Government broke its promise; it *repudiated* the contracts; and it must give the companies their money back." *Id.* at 607 (emphasis added).[2]

[2] A brief review of § 250 of the Restatement likewise extinguishes any doubt as to the Court's holding. *See, e.g.*, Restatement at 271 (rules under topic "Effect of Prospective Non-Performance" described as being designed to afford protection where a party impairs the other party's expectation of performance *before* the time for performance arrives); *id.* at

Second, respondent asserts that "nothing in *Mobil* turned on whether the statute at issue there was an anticipatory repudiation or an actual breach of the government's contract." Opp. 14. The government is wrong again. The Court's holding that the legislation at issue constituted a repudiation under the Restatement § 250 was critical to its holding that the remedy of restitution was available to the contractors under the Restatement § 373. *Id.* at 608, 624 (holding that "if one party to a contract . . . advances the other party money, principles of restitution normally require the latter, *upon repudiation*, to refund that money") (emphasis added). Thus, if the legislation had not constituted a repudiation, the contractors would not have been able to recover the restitution award they obtained. *See id.*[3]

Finally, in order to bolster its position that Congress "eliminated"—rather than merely repudiated—the contract rights at issue by passing a law, respondent argues that the FmHA's failure to perform its contractual duty to accept prepayment requests when made by owners has no

273, Illustration 1 ("On April 1, A contracts to sell and B to buy land, delivery of the deed and payment of the price to be on July 30. On May 1, A tells B that he will not perform. A's statement is a repudiation.").

[3] Respondent suggests that the only situation where the doctrine of anticipatory repudiation might apply in the government contract context is where "a government official or agency simply announced that it was not going to honor a contractual obligation." Opp. 11. By making this analogy, respondent further demonstrates its misunderstanding of the holding in *Mobil* and its belief that legislation could never be construed as a repudiating act. Respondent also contends that legislation differs from a repudiation by a private party because legislation cannot be retracted. Opp. 11-12. History has proven, however, the contrary. In fact, the government had earlier repudiated petitioners' contracts by passing a law in 1979 that restricted the ability of the FmHA to accept loan prepayments, but then retracted that repudiation by passing another law in 1980 that restored the agency's authority. *See* Pet. 7-8 n.5; *see also Mobil*, 580 U.S. at 621 (noting that the government did not argue that it "retracted" its legislative repudiation). Thus, respondent's contention that the doctrine of anticipatory repudiation has no place in the realm of legislative acts is erroneous.

relevance to the question of when the government breached the contracts. Significantly, the government finally admits a critical fact that it had previously denied: that the FmHA had a duty to "accept" such requests. Opp. 3, 9, 11-12 n.3.[4] Yet it maintains that the Federal Circuit was correct in holding that "the note's prepayment provision did not require any performance on the part of the government . . . ." Opp. 12 n.3.[5] Having admitted that the FmHA had an affirmative duty to perform by accepting prepayment requests, the government cannot escape the conclusion that the legislation was no more than an anticipatory repudiation

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[4] Before the Federal Circuit, respondent argued that petitioners were "mistaken in asserting that the performance required of the FmHA under the prepayment term was to accept prepayment if and when it was offered by a borrower." App. Bf. at 29 (*Franconia*), 25 (*Grass Valley*).

[5] Respondent's claim that the lower court's holding is limited to the proposition that "the prepayment clause did not require any government performance *aside from* permitting petitioners to prepay their note" (Opp. 12 n.3) is inaccurate: the holding, in fact, *affirms* the *Franconia* trial court's analysis that:

> no performance by the government is required—it is merely a promise *to allow* the borrower to prepay. . . . The government's performance, if it can be called that, is to keep its promise *to allow* borrowers an unfettered prepayment right. No further performance was required by the government. . . ."

Pet. App. A31 (emphasis added). Thus, the Federal Circuit held—in accord with the government's own former position below—that the government's performance under the contractual prepayment clause was merely "to keep its promise" *to allow* an owner to prepay, not *to accept* a prepayment from an owner, and that ELIHPA therefore constituted an immediate breach because it *disallowed* the prepayment right. This holding, which is wholly inconsistent with the government's admission that the agency did have a duty to accept prepayments, is also directly contrary to the Federal Circuit's holding in *Greenbrier v. United States*, 193 F.3d 1348, 1357 (Fed. Cir. 1999) (ELIHPA prepayment restrictions do not *disallow* owners from submitting prepayment requests but rather place additional conditions on the government's ability *to accept* such requests when made). *See also* Pet. 22-23 (detailing the procedures FmHA must follow to "accept" an offer to prepay, including accepting final payment and releasing the security to the owner).

of the contracts, which did not ripen into an actual breach until the agency failed to perform its obligation to accept such requests. *See* Pet. 21-24; *see also Mobil*, 530 U.S. at 620 (finding government consideration of plans submitted by contractors to be a "necessary reciprocal obligation" without which the contracts would be rendered "illusory").

D. Respondent Mischaracterizes Petitioners' Claims.

Respondent attempts to support its unprecedented arguments by fundamentally misstating petitioners' claims. Respondent repeatedly refers to the contract right at issue as an "unfettered" right to prepay, and argues that petitioners' claims accrued when the legislation rendered that right no longer "unfettered." Opp. 6-7, 8-9, 11-12, 17, 19. That terminology, however, finds no source in the Petition or petitioners' pleadings. In reality, petitioners have always alleged that the legislation amounted to an anticipatory repudiation of their contracts and that a breach occurred when the FmHA failed to perform its contractual duty to accept prepayment requests when made. Pet. App. A112-13, A123, A126, A128-29, A132-33. Thus, if anything was "fettered" by the legislation, it was the agency's *obligation to accept* prepayments, not the prepayment *right* itself. *See* Pet. 22 n.18. In any event, no support exists for the government's theory that petitioners' contract claims accrued when their rights were "fettered," as opposed to when the agency breached by failing to perform its contractual obligation to accept prepayment requests.

* * *

Contract law is about rights, repudiations, and breaches. The application of standard contract law principles to this case is clear: (1) petitioners held a contractual right to prepay; (2) the government repudiated that right by passing legislation announcing that the contracting agency would not perform its contractual obligations when its performance came due; and (3) the contracting agency breached each petitioners' contract when it rejected their requests to

prepay. The government tries to avoid these conclusions by seeking an exemption from standard contract law principles and attempting to circumvent this Court's precedent.

II. Agency Action Also Was Required For Petitioners' Taking Claims To Accrue.

Respondent's attempts to justify the dismissal of petitioners' taking claims falls even shorter. Lacking any credible basis for distinguishing this Court's expansive precedent on the ripeness of regulatory taking claims, the government resorts to attacks on the merits of petitioners' claims and mischaracterizations of their property rights.

All of respondent's arguments are directed toward a taking claim that petitioners have not made. While petitioners specifically alleged a taking of state-created real property interests (*see* Pet. 28-29), respondent argues that petitioners' taking claims must be construed as asserting only the taking of a contract right—an "unfettered right to prepay" to be precise. Respondent then asserts that any such taking must have occurred when the law allegedly "eliminated" that right. Opp. 15-18. This is the same "straw man" argument that the Federal Circuit devised: propping up a claim different from the one that petitioners made and then striking that claim down. Respondent's attempts to recast petitioners' claims to suit its needs should be ignored.

Respondent does not argue that this "taking of a contract right" is the claim that petitioners have alleged, but rather that this is the only taking claim that respondent believes is viable. Opp. 15-16 (asserting that this is "the only 'property' that could have been taken"). Apart from being wrong as a matter of law,[6] this attack on the merits of petitioners' claims

[6] Respondent argues that petitioners' taking claims must be viewed solely as a taking of contract rights because petitioners "contracted away" their real property interests. Opp. 15 n.7. However, petitioners lost their rights in their land by entering into a loan agreement and mortgage with the government no more than a homeowner loses all rights to his or her house by taking out a mortgage. Further, petitioners' agreement to dedicate their properties to a certain use for a limited period of time does not in any way negate their property rights. *See, e.g., Prudential Ins. Co. v. United States*, 801 F.2d 1295, 1300, n.13 (Fed. Cir. 1986); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

is premature. The trial court ruling at issue was made *sua sponte* on the government's motion to dismiss on limitations grounds. Thus, at this stage, the only relevant question is whether the taking claims petitioners alleged were filed in a timely manner. Respondent's substantive challenge to petitioners' taking claims only serves to reveal the lack of any persuasive grounds for upholding the decisions below.

Regardless of how it construes petitioners' taking claims, respondent cannot escape the key fact that the courts below overlooked: that under the scheme set up by the legislation, the FmHA is authorized to accept owners' requests to prepay and permit them to leave the Section 515 program if certain criteria are met. *See* Pet. 9, 25-26. As a result, this Court's precedent holding that an "as-applied" regulatory taking does not accrue until the agency makes a decision on the scope of permissible use of the property applies with full force. *See* Pet. 25-29. Respondent's only attempt to avoid this precedent is its argument that those cases have no application outside of the land use context. As noted above, however, petitioners do in fact allege a taking of their real property rights. Further, there is no basis for respondent's proposed limitation of the Court's precedent to cases involving land use restrictions.

Finally, respondent asserts that the ruling below—that petitioners' taking claims accrued immediately upon the enactment of the legislation—is perfectly consistent with *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999), which held that the taking claims of owners under a materially identical housing program administered by HUD did not accrue until the agency made a final decision on each owner's prepayment request. Abandoning its prior attempts

to distinguish the case, respondent asserts that *Greenbrier* is inapposite because the property rights at issue there were contained in a contract to which the government was not a party. Opp. 18. Once again, respondent cites no authority for the proposition that standard legal principles—this time regarding the law of takings—are somehow different where a contract with the government is involved. Moreover, nothing in *Greenbrier* turned on the nature or source of the property right at issue. Rather, the holding was guided by the nature of the legislation, which, like the legislation here, provided an exception authorizing the agency to accept prepayments without restrictions when it determined that there was no longer a need for the housing. *Id.* at 9; *see* Pet. 2-3, 9, 26-30.

The conflicting results in *Greenbrier* and this case reveal the extent to which the government has been permitted to operate on dual tracks in the affordable housing prepayment litigation. In *Greenbrier*, the government obtained dismissal of the HUD owners' taking claims on ripeness grounds as having been filed too early. In *Franconia*, the government obtained dismissal of the materially identical taking claims of FmHA owners on limitations grounds as having been filed too late. The Court should grant certiorari in this case to correct this decisional flip-flop by the Federal Circuit and prevent the government from successfully arguing directly contrary positions in different cases to suit its needs.

CONCLUSION

For the reasons set forth above and in the Petition, the Court should grant certiorari in this case.

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